HARVARD
LAW REVIEW

VOL. XXVIII MAY, 1915 NO. 7

DOES A PARDON BLOT OUT GUILT?

IT has been said by the Supreme Court of the United States in a leading case,[1]

"A pardon reaches both the punishment prescribed for the offence and the guilt of the offender. . . . It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. . . . It removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity."

and these words have been often quoted subsequently.[2]

There is in the human mind a love of paradox which finds its expression in all professions. In the law there has been a vast

[1] *Ex parte* Garland, 4 Wall. 333, 380 (1866).

The Supreme Court at an earlier day had expressed through Chief Justice Marshall more accurately the nature of a pardon.

"A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." United States *v.* Wilson, 7 Pet. 150, 159 (1833).

This statement has been quoted as an accurate one in Burdick *v.* United States, 236 U. S. 79, 89 (1915).

[2] Illinois Central R. *v.* Bosworth, 133 U. S. 92, 103 (1890); *Ex parte* Weimer, 8 Biss. 321, 324 (1878); *In re* Spenser, 5 Sawy. 195, 199 (1878); *In re* Executive Communication, 14 Fla. 318, 319 (1872); Singleton *v.* State, 38 Fla. 297, 302, 21 So. 21, 22 (1896); United States *v.* Athens Armory, 35 Ga. 344, 363 (1868); People *v.* Court of Sessions, 141 N. Y. 288, 294, 36 N. E. 386, 388 (1894); Knapp *v.* Thomas, 39 Oh. St. 377, 381 (1883); Wood *v.* Fitzgerald, 3 Ore. 568, 577 (1870); Diehl *v.* Rodgers, 169 Pa. St. 316, 322, 32 Atl. 424, 426 (1895); Carr *v.* State, 19 Tex. App. 635, 661 (1885); Edwards *v.* Commonwealth, 78 Va. 39, 43 (1883).

deal of it and there is still too much. When it is said that "In the eye of the law the offender is as innocent as if he had never committed the offence," we have something of the sort. It is asserted that the law regards as true what is inherently false. Everybody knows that the word "pardon" naturally connotes guilt as a matter of English. Everybody also knows that the vast majority of pardoned convicts were in fact guilty; and when it is said that in the eye of the law they are as innocent as if they had never committed an offence, the natural rejoinder is, then the eyesight of the law is very bad.

It may perhaps be supposed that this is a mere criticism of language and that the substance of the statement is merely that the law will impose no more penalty upon the offender than it would upon an innocent man. If no more than this is intended, then the latter form of expression should be used; for the language criticised, if its natural meaning is accepted, means more than this and, as will be seen, endeavors have frequently and sometimes successfully been made to carry this language to logical consequences productive of highly undesirable results. If the offender really is to be treated as an innocent man after his pardon, the offence which he has committed cannot properly be made ground for removing him from the office of an attorney or trustee, or from any other office. He not only cannot be disqualified as a witness, but proof of his conviction should not be allowed to discredit him. If an alien, he should not be debarred from naturalization.

Though the language of the Supreme Court of the United States is perhaps the most extreme statement which has been made of the effect of a pardon, it was not made without some warrant from English precedents; but even if these precedents fully justified the conclusions which have been drawn from them, the conclusions should be attacked as inherently wrong. There is, however, greater reason for such an attack if it can be shown that to a considerable degree the early precedents have been misunderstood, or departed from. The truth seems to be as Lord Coke says, "*Poena mori potest, culpa perennis erit.*" [3] But confusion has been caused

[3] Brown *v.* Crashaw, 2 Bulst. 154 (1614). See also the definition of Marshall, C. J., quoted (p. 647, n. 1) from United States *v.* Wilson, 7 Pet. 150 (1883), quoted with approval in Burdick *v.* United States, 236 U. S. 79, 89 (1915); People *v.* Bowen, 43 Cal. 439, 442 (1872); Territory *v.* Richardson, 9 Okla. 579, 584, 60 Pac. 244, 245 (1900); and language quoted *infra*, p. 658, n. 41, from Cook *v.* Middlesex, 2 Dutch. (N. J.) 326,

because certain punishments which the law attached to crime were of a general sort affecting civil capacity. These consequences of the legal infamy of the convict were disposed of by the pardon, in the same way as other punitive consequences of conviction.[4]

The earliest statement of the English law of pardon is made apparently by Bracton,[5] who wrote in about the middle of the thirteenth century. He says of the effect of a pardon:

"But in all the aforesaid cases, whatever may have been the cause, when the outlawry has been made duly and according to the law of the land, a person is not restored except to the king's peace alone, that he may go and return and contract anew, for that which has been dissolved by the outlawry cannot be joined anew by the inlawry without a new intention on the part of those who have contracted. For the king cannot grant a pardon with injury or damage to others. He may give what is his own, that is his protection, which the outlawed person has lost through his flight and contumacy, but that which is another's he cannot give by his own grace. Likewise a person justly and duly outlawed is not restored to anything except to the king's peace, that he may go and return and have protection, but he cannot be restored to his rights of action and other things, for he is like a new-born infant and a man as it were lately born. Likewise inlawry does not restore a person to his previous actions and obligations, nor to his homage nor fealties, nor to his oaths, nor to other things dissolved by his outlawry, against the will of those by whose will they were previously united and confirmed, and accordingly neither to his inheritances nor to his tenements to the prejudice of the lords, and so they cannot be restored to those things to which they had only a right. But no one is bound to them by preceding obligations, but they are bound to all others, that they may not be in a better condition on account of their outlawry, since they ought to be in a worse condition."

The phrase in this extract that a pardoned man "is like a new-born infant and a man as it were lately born" seems to be the basis of any subsequent assumption that a pardoned offender is to be regarded as an innocent man. The extract, however, shows clearly

331 (1857). Contrast, however, with these expressions the denial by Mitchell, J., in Diehl *v.* Rodgers, 169 Pa. St. 316, 319, 32 Atl. 424 (1895), of the correctness of Coke's statement that the guilt remained; and also the statements inconsistent with Coke's which are criticised in this article.

[4] "When, therefore, the judgment is pardoned, the legal infamy flowing from it, is equally disposed of by the pardon." People *v.* Pease, 3 Johns. Cas. (N. Y.) 333, 334 (1803).

[5] Twiss's translation, vol. 2, p. 371.

enough that the writer's idea was not that the offence was regarded by the law as not having been committed, or even as no longer existing, but that the offender, so far as concerned the future, acquired the legal capacity of an innocent man. At a time when conviction destroyed civil rights this was a very important matter. There is nothing fictitious in Bracton's statement, and in view of the criminal law of the time, his analogy of the new-born infant is not inappropriate. The following extract from Pollock and Maitland's History [6] indicates also clearly enough that the eye of the law was not formerly so blind as to be unable to see that a pardoned felon had committed the crime of which he had been convicted.

"The king could not protect the man-slayer from the suit of the dead man's kin. Even when the pardon was granted on the score of misadventure, this suit was saved by express words. Proclamation was made in court inviting the kin to prosecute, but telling them that they must come at once or never. What could the kin do in such a case? They could make themselves extremely disagreeable; they could extort money. In Henry III.'s day Mr. Justice Thurkelby was consulted by a friend who had obtained a pardon, but was being appealed. The advice that the expert lawyer gave was this: 'You had better go to battle; but directly a blow struck cry "Craven" and produce your charter; you will not be punished, for the king has given you your life and members.'"

Early in the reign of Edward III, it was ruled [7] that one appealed of felony who broke prison should lose his right of battle, but if pardoned by the king, his right was restored. Here it will be noticed that there had never been a conviction of felony, and the ground of decision seems to be that breaking prison was an injury to the king only and he had pardoned it.

In 1410 [8] the validity of indictments presented by a grand jury of which one member was outlawed and another a pardoned felon was drawn in question and the conclusion of the case is as follows:

"And then on the opinion of all the justices, since one of the indictors was outlawed and another was excused and acquitted by the benefit of a general pardon, so that they were not *probi et legales homines* to inquire as the law wishes, it was awarded that all the indictments by them shall be taken as annulled."

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[6] Vol. 2, p. 481.

[7] LIB. ASSIZ. fol. 1, pl. 3; FITZ H. ABR. CORONE, pl. 154, 281.

[8] 11 HEN. IV, fol. 41 *b*, pl. 8.

The same conclusion was reached about two centuries later by Lord Coke [9] who said of a pardoned felon not only that "he is not a fit person to serve on a jury," but also "by the same reason the testimony of such an one for a witness is in all cases to be rejected." [10]

No case arose subsequently which indicated any enlargement of the views of the English Court as to the effect of a pardon until *Cuddington* v. *Wilkins*, decided in 1615.[11] This decision has probably been the main foundation of the impression that after a pardon the law could not thereafter see the convict's guilt. The case was as follows: "Cuddington brought an action of the case against Wilkins for calling him a thief. The defendant justified, because beforetime he had stolen somewhat. The plaintiff replied, that since the supposed felony, the general pardon in the seventh year of the king was made, and makes the usual averment to bring himself within the pardon. Whereupon the defendant demurs." The court said the felony was by pardon extinct; and the case "was adjudged for the plaintiff, for the whole court were of opinion that though he was a thief once, yet when the pardon came it took away, not only *poenam*, but *reatum*, for felony is *contra coronam et dignitatem regis*," and the report proceeds:

"Now when the king had discharged it, and pardoned him of it, he had cleared the person of the crime and infamy, wherein no private person is interested but the Commonwealth, whereof he is the head, and in whom all general wrongs reside, and to whom the reformation of all general wrongs belongs."

The case is referred to again in a later part of the same reports, four years afterwards, in a case of *Searle* v. *Williams*,[12] where Hobart, C. J., says:

"And therefore I hold that if a man shall call him felon, or thief, he may have his action, as upon any other pardon, which we resolved in the case of *Cuddington* v. *Wilkins*."

But that the court meant that the legal infamy of the conviction was removed, not that the offender was "as innocent as if he had

[9] Brown *v.* Crashaw, 2 Bulst. 154 (1614). But see Puryear *v.* Commonwealth, 83 Va. 51, 1 S. E. 512 (1887).

[10] On this point more recent decisions have reached a contrary conclusion.

[11] Hob. 67, 81; s. c. Brownl. & G. 10.

[12] 2 Hob. 288, 294 (1618).

never committed the offence" is evident from the following sentence in the report:

"It was said, that he could no more call him thief, in the present tense, than to say a man hath the pox, or is a villain after he be cured or manumised, but that he had been a thief or villain he might say." [13]

The immediate effect of the decision was the reversal of Coke's *dictum* that a pardoned felon could not be permitted to testify.[14]

The protection of a pardoned convict from being called by a name appropriate to his crime, and the restoration of his competency to testify, were sometimes expressed by stating that the convict acquired a new "credit" or "credit and capacity." The fact that this mode of expression is used by Hawkins in his "Pleas of the Crown"[15] and by Blackstone in his "Commentaries,"[16] has led to the habitual quotation of these words subsequently. But the decision even in *Cuddington* v. *Wilkins*,[17] if the distinction which the court there took between saying he *is* a thief and he *was* a thief is borne in mind, amounts to no more than this, that as the plaintiff had been cleared of the legal consequences of infamy, a statement in the present tense, implying that he was still infamous, was slanderous. Nor does the admission of the testimony of a pardoned felon imply that credit must be given to his testimony.[18]

[13] Hob. 81, 82 (1615). The principal case was followed in Leyman *v.* Latimer, 3 Ex. D. 15 (1877), on very similar facts, and the court upheld the validity of the distinction taken in Cuddington *v.* Wilkins, between the legality of using the present and the past tense.

[14] In Celier's Case, T. Ray. 369 (1680), "It was debated, That admit a witness be convicted of felony, and afterwards pardoned, whether he shall thereby be restored to be a good witness? and my lord chief justice Scrogs and myself were of opinion, That he could not, because the pardon doth take away the punishment due to the offence, but cannot restore the person to his reputation; and of that opinion was justice Nichols in Cuddington and Wilkins' case; Moor 872, pl. 1213. But my brother Jones and Dolben *contra*; and so afterwards did I conceive; for in the case of Cuddington and Wilkins, as 't is reported in Hobart, 't is said, That the pardon takes away not only *poenam*, but *reatum*." See also King *v.* Crosby, 5 Mod. 15 (1695); Rex *v.* Castlemain, T. Ray. 379 (1680); Rookwood's Case, Holt 683 (1696).

[15] Bk. 2, c. 37, § 48 (title Pardon).

[16] Vol. 4, p. 402.

[17] Hob. 67, 81 (1615).

[18] Thus in BACON, ABR., title Pardon (H), it is said: "A pardon restores a man to his credit so as to enable him to be a witness, but yet his credit must be left to the jury."

In Rookwood's Case, Holt 683, 685 (1696), Holt said, "The pardon restores him to his former capacity," but added, "The conviction indeed might be objected to his credit."

The true line of distinction seems to be this: The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

The importance of the distinction suggested may be illustrated by modern decisions which generally support in their results the argument here advanced, but often not without finding some trouble to escape from the effect of the statement in *Ex parte Garland* [19] and similar statements to the effect that a pardoned convict is to be treated as if he were innocent.

The question still most frequently raised concerns the capacity of a pardoned criminal to testify. The modern decisions, following the earlier precedents rightly hold that a pardon removes this incapacity,[20] except in the case of perjury. The law of England here made an exception and the testimony of a convicted perjurer was totally inadmissible.[21] Probably this is still the law of England and a few cases in the United States have accepted the distinction between perjury and other crimes.[22] But unless it can be maintained successfully that there is a rule of evidence which

[19] 4 Wall. 333, 380 (1866).

[20] Boyd *v.* United States, 142 U. S. 450 (1892); Thompson *v.* United States, 202 Fed. 401 (1913); Singleton *v.* State, 38 Fla. 297, 303, 21 So. 21, 22 (1896); Roberson *v.* Woodfork, 155 Ky. 206, 159 S. W. 793 (1913); Diehl *v.* Rodgers, 169 Pa. St. 316, 32 Atl. 424 (1895); State *v.* Foley, 15 Nev. 64, 68 (1880); Easterwood *v.* State, 34 Tex. Cr. App. 400, 31 S. W. 294 (1895); Perry *v.* State, 155 S. W. 263, (Tex. Cr. App.) (1913). This is true even though the pardon is not given until after the convict has served his sentence. People *v.* Bowen, 43 Cal. 439 (1872); State *v.* Blaisdell, 33 N. H. 388 (1856); United States *v.* Jones, 2 Wheeler's Crim. Cas. (N. Y.) 451 (1824); Rivers *v.* State, 10 Tex. App. 177 (1881).

[21] Wicks *v.* Smalbrooke, 1 Siderf. 51 (1661); Rex *v.* Greepe, 2 Salk. 514 (1697); Rex *v.* Crosby, 2 Salk. 689 (1695); Rex *v.* Ford, 2 Salk. 691 (1700); Anon., 3 Salk. 155 (1697).

[22] Houghtaling *v.* Kelderhouse, 1 Parker Crim. Rep. (N. Y.) 241 (1851). See also Holridge *v.* Gillespie, 2 Johns. Ch. (N. Y.) 30 (1816), and an article signed G., presumably by Professor Greenleaf, in 11 AM. JUR. 356.

In Foreman *v.* Baldwin, 24 Ill. 298 (1860), the same conclusion was reached in regard to a convict pardoned for larceny in view of a statute prohibiting the acceptance of the testimony of one pardoned for that crime.

not only excludes altogether from consideration the testimony of one who has testified falsely in the case on trial, but also excludes the testimony of one who has previously committed perjury, though never convicted thereof, these decisions cannot be accepted for they involve the conclusion that not the act but the criminal conviction is the basis of exclusion, and it seems clear that the legal consequences of the conviction as such are removed by the pardon. The Supreme Court of Pennsylvania in a careful decision criticising and declining to follow the earlier cases, has admitted the testimony of a pardoned perjurer.[23]

If, however, the eye of the law were unable to distinguish between a pardoned convict and one who had never been found guilty of a crime, proof of the conviction should be as inadmissible to affect the credibility of the witness as it is to effect his capacity to testify; yet it has always been the law and still is that in spite of the pardon the conviction may be used to discredit the witness.[24]

The right of suffrage forfeited by conviction is restored by a pardon;[25] and the same principle seems applicable here that governs the capacity of a witness. As it was not guilt but conviction which took away the right, the deprivation of it is a legal punishment, and as such a pardon should excuse it.

But under a statute which requires as a condition of naturalization that the alien seeking to be naturalized must prove that he has behaved as a man of good moral character during his residence in the United States, it has been rightly held that a pardoned convict is not within the statute.[26] Here it is not conviction, but character, which is in question. The court after quoting from *Ex parte Garland*[27] said:

[23] Diehl *v.* Rodgers, 169 Pa. St. 316, 32 Atl. 424 (1895). The same conclusion is reached in Roberson *v.* Woodfork, 155 Ky. 206, 159 S. W. 793 (1913), but the court apparently was unaware that a distinction had ever been taken between perjury and other crimes.

[24] Rookwood's Case, Holt 683, 685 (1696); United States *v.* Jones, 2 Wheeler Crim. Cas. (N. Y.) 451 (1824); Baum *v.* Clause, 5 Hill (N. Y.) 196 (1843). It has even been held that evidence of the pardon is not admissible as tending to remove the discredit of the conviction. Martin *v.* Commonwealth, 25 Ky. L. Rep. 1928 (1904). *Cf.* 2 WIGMORE, EVIDENCE, § 1116.

[25] *In re* Executive Communication, 14 Fla. 318 (1872); Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407 (1892); State *v.* Lewis, 111 La. 693, 695, 35 So. 816, 817 (1904); Jones *v.* Board, 56 Miss. 766 (1879); Wood *v.* Fitzgerald, 3 Ore. 568 (1870).

[26] *In re* Spenser, 5 Sawy. 195, 199 (1878).

[27] 4 Wall. 333, 380 (1866).

"And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offence."

It may be doubted if a court requested to appoint such a person a trustee, would feel sure that he had even been restored to "a state of innocence."

In an Arkansas case,[28] it appeared that a probate judge had been convicted of felony and had appealed; while the appeal was pending, he received a pardon which he thereupon pleaded and was discharged. It was held on *quo warranto* proceeding that the unreversed conviction prevented him from exercising the office of a judge.[29]

A Virginia statute prescribed a five years' sentence on conviction for a second time of a minor offence. It was held illegal to sentence for this period one who had been pardoned for the first offence.[30] This decision seems wrong. The court said that the first offence was in legal contemplation "blotted out." But what has been said sufficiently shows that the law can still see perfectly well, if it is material, that the pardoned offence was committed. The statutory punishment of five years' imprisonment was not a punishment for the first offence, nor partly for the first and partly for the second. It was a punishment imposed by law for the second offence exclusively; and neither in law nor in reason does there seem any warrant for punishing more lightly the second offence of one whose first offence has been pardoned.

In several cases the question has arisen of disbarring lawyers who had been convicted of crime but pardoned. The courts have found some difficulty in escaping the language of *Ex parte Garland*,[31] and in Texas, it has actually been held that a pardon is a complete defence to disbarment proceedings based on the pardoned offence.[32]

[28] State *v.* Carson, 27 Ark. 469 (1872).

[29] See, to the same effect, Commonwealth *v.* Fugate, 2 Leigh (Va.) 724 (1830).

[30] Edwards *v.* Commonwealth, 78 Va. 39 (1883).

[31] 4 Wall. 333, 380 (1866).

[32] Scott *v.* State, 6 Tex. Civ. App. 343, 25 S. W. 337 (1894).

Indeed, the case of *Ex parte Garland* itself [33] concerned the right of a pardoned offender to practice law before the Supreme Court, and though the decision of the court may be right, since the only ground for supposing that complicity in the war of the rebellion (the offence in question) would involve disbarment as a consequence, was a statute which imposed as a penalty disability to practice before the court, some of the reasoning of the case would support the conclusion which the Texas court actually reached.

The Maine court only escaped from such an embarrassing conclusion by discovering that the defendant had been guilty of another crime beside that for which he had been convicted and pardoned. He had forged a deposition and had been convicted for forgery. The court held that pardon for this offence did not excuse him from his guilt in offering the deposition as evidence in court.[34]

The New York court, though disbarring the offender, was itself guilty of the following unpardonable reasoning:

"The pardon does reach the offence for which he was convicted, and does blot it out, so that he may not now be looked upon as guilty of it. But it cannot wipe out the act that he did, which was adjudged an offence. It was done, and will remain a fact for all time." [35]

How a man who "may not now be looked upon as guilty" of a crime, nevertheless did the act which was a crime and must now be disbarred for it, it is difficult to imagine.

In Kentucky, also, disbarment proceedings were successful but the reasoning of the opinion not wholly satisfactory.[36]

An interesting case to compare with these is an English decision [37] which held a pardoned convict entitled to engage in the business of selling liquor at retail although an Act of Parliament provided that "Every person convicted of felony shall forever be disqualified from selling spirits by retail, and no license to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid. . . ." It will be observed that this statute in form imposes a disability to carry on a certain business as a penalty for

[33] 4 Wall. 333 (1866).

[34] Penobscot Bar *v.* Kimball, 64 Me. 140 (1875).

[35] In the matter of an Attorney, 86 N. Y. 563, 569 (1881). See also, In the matter of Niles, 48 How. Prac. (N. Y.) 246 (1875); In the matter of E., 65 How. Prac. (N. Y.) 171 (1879).

[36] Nelson *v.* Commonwealth, 128 Ky. 779, 109 S. W. 337 (1908).

[37] Hay *v.* Justices, 24 Q. B. Div. 561 (1890).

conviction of crime, but fairly construed and having in mind the obvious purpose of the statute, there can be no doubt that the intent of Parliament was to emphasize the requirement of good character (which doubtless existed apart from the statute) as a qualification for conducting the business of selling liquor at retail. The decision warrants the conclusion that if a statute should provide that no one should be admitted to the practice of the law or of medicine, or should be elected a judge, who had been convicted of felony, a pardon would qualify him. The truth is that while pardon dispenses with punishment, it cannot change character, and where character is a qualification for an office, a pardoned offence as much as an unpardoned offence is evidence of a lack of the necessary qualification.

The varied possibilities of a doctrine which denies to the law the possibility of distinguishing between a pardoned convict and one who has never committed a crime are illustrated by an Ohio decision.[38] This was a *quo warranto* proceeding to prevent certain persons from exercising the office of police commissioners from which they had been removed by the governor, and the question was raised as to the sufficiency of the causes for their removal set forth by the governor. One of the causes was that the commissioners had appointed to a position on the police force one Mike Mullen who, the Governor asserted, was "a man of notorious bad character;" and Mike Mullen had not only been appointed but subsequently promoted. It appeared that Mullen had been convicted of crime, but had subsequently been pardoned. It was urged in defence of the commissioners that Mike Mullen's guilt had been "blotted out" and the offence obliterated, and therefore that it was proper to appoint and promote him. This view was actually taken by a dissenting judge. The majority of the court, however, did not allow their common sense to be impaired by judicial *dicta*, and said:

"Whatever the theory of the law may be as to the effect of a pardon, it cannot work such moral changes as to warrant the assertion that a pardoned convict is just as reliable as one who has constantly maintained the character of a good citizen." [39]

[38] State *v.* Hawkins, 44 Oh. St. 98, 5 N. E. 228 (1886).

[39] State *v.* Hawkins, 44 Oh. St. 98, 117, 5 N. E. 228, 237 (1886). The opinion continues:

"It is a perversion of language to give the views expressed by Judge Okey in Knapp

If one who has paid a fine on conviction of crime and is subsequently pardoned, is indeed an innocent man, or is to be so regarded by the law, he should have the fine which he has paid returned to him. An early Georgia decision actually reached this result.[40] But the contrary conclusion was reached in New Jersey on elaborate consideration.[41]

A similar question arose in the Supreme Court of the United States.[42] One who had been convicted of crime was granted a pardon conditional upon his returning certain lands of which he had been charged with defrauding the government. Before returning the lands he made an agreement with the District Attorney that he should be reimbursed for certain expenditures which he had made upon the land. If he was to be treated as an innocent man, he certainly had a moral right to have his outlay returned, and under the law of Louisiana (where the case arose) perhaps a legal right. The Supreme Court, however, indulged in no fictitious belief in his guilt having been blotted out, and refused to enforce in his favor the agreement with the District Attorney.

A probable reason why courts have been willing to continue a

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v. Thomas, 39 Oh. St. 377, such a construction. He never meant anything of the kind." One who reads Judge Okey's remarks which are in substance taken from *Ex parte* Garland, 4 Wall. 333, 380 (1866), will be inclined to think that the error is rather in the language of Judge Okey than in the deductions of those who seek to attach to it the meaning that Mike Mullen's character was as good as if he had never committed an offence.

[40] Flournoy *v.* Attorney-General, 1 Ga. 606 (1846).

[41] Cook *v.* Freeholders of Middlesex, 2 Dutch. (N. J.) 326, 331, 333 (1857). "If pardons were granted upon the idea of the innocence of the party pardoned, there would be manifest justice in returning the fine not only, but also in making full indemnity for all the injury sustained by reason of the conviction. And a recent decision is based upon the ground that a pardon proceeds upon the idea of innocence. The power, it is said, is given to the executive to relieve against the possible contingency of a wrongful conviction. I am not aware that this idea of *innocence* has ever been assumed by any writer upon government, or law, or ethics, as the true foundation of the pardoning power in the state. No doubt a clear case of innocence presents the strongest ground for the immediate remission of all the penalties of conviction. But that is not in practice the ground upon which pardons are or ought to be based, nor is it the ground upon which the pardoning power in a government is created and sustained. Pardon implies guilt. If there be no guilt, there is no ground for forgiveness. It is an appeal to executive clemency. It is asked as a matter of favor to the guilty. It is granted not of *right* but of *grace*. A party is acquitted on the ground of innocence; he is pardoned through favor. And upon this very ground it is that the pardoning power is never vested in a judge."

[42] Bradford *v.* United States, 228 U. S. 446 (1913).

mode of expression which suggests that a pardoned convict is the equal in character and conduct of an innocent man is because it has seemed desirable to conceal an injustice which the criminal law inflicts upon an innocent man unjustly accused and convicted. Under the law of England no new trial was possible in case of felony.[43] The only redress, therefore, for an unjust conviction was a pardon. Of this procedure an acute English critic (afterwards a judge) said:

"However unsatisfactory such a verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed. All that can be done in such a case is to apply to the Queen through the Secretary of State for the Home Department for a pardon for the person supposed to have been wrongly convicted.

"This is one of the greatest defects in our whole system of criminal procedure. To pardon a man on the ground of his innocence is in itself, to say the least, an exceedingly clumsy mode of procedure; but not to insist upon this, it cannot be denied that the system places every one concerned, and especially the Home Secretary and the judge who tried the case (who in practice is always consulted), in a position at once painful and radically wrong, because they are called upon to exercise what really are the highest judicial functions without any of the conditions essential to the due discharge of such functions. They cannot take evidence, they cannot hear arguments, they act in the dark, and cannot explain the reasons of the decision at which they arrive. The evil is notorious." [44]

This defect in English procedure was corrected by the Act of 1907 creating a court of criminal appeal, with the widest powers, including the right to hear further evidence and decide questions of fact.

In the United States new trials are permitted without the aid of statute, provided the order is made before the end of the term;[45] but only under very exceptional circumstances is there any way by which newly discovered evidence proving a prisoner's innocence or the unfairness of his trial can be made available after the term in which judgment against him was given has expired, except by pardon.[46] How extreme may be the results of the prevailing doctrine

[43] Regina *v.* Murphy, L. R. 2 P. C. 535 (1869).

[44] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW, p. 312.

[45] Sparf *v.* United States, 156 U. S. 51, 175 (1895).

[46] United States *v.* Mayer, 235 U. S. 55 (1914). An unpublished decision of Dodge,

is shown by the facts in a recent Colorado case.[47] There the innocence of a convicted defendant had been proved not only by the confession but by the subsequent conviction of the real criminal; but because the term had expired the court refused to set aside the conviction and suggested that the only recourse left to the defendant was to apply for a pardon.

As courts apparently do not feel justified in adopting of their own motion a flexible procedure permitting them to do justice after the close of a term, statutes should be passed authorizing them to set aside a conviction or grant a new trial, at any time, in their discretion, when the facts warrant such relief.

Although the reasons which should justify a court in reversing a previous decision or ordering a new trial after the expiration of the term, are far stronger in criminal than in civil cases, in fact by statute or rules of equity a considerable measure of relief is allowed in civil cases, while in criminal cases the occasions are few indeed where the end of the term in which conviction was had is not final.

All the arguments which justify giving relief in civil cases are ten times stronger when applied to criminal cases. To be deprived, by a purely technical rule, of money or property which justly belongs to one, when this can be proved and when there has been no fault in not making earlier proof, is hard enough; but when the stake is life or liberty and reputation, it is an intolerable grievance to lose when newly discovered evidence makes it clear that injustice has been done. Moreover, in a criminal case, undoing what has been done even after a long time works no injury to others, in working

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J., rendered in the Massachusetts District Court on the remanding by the Circuit Court of Appeals of Trafton *v.* United States, 147 Fed. 513 (1906); United States *v.* New York Cent. & H. R. R. Co., 164 Fed. 324 (1908); United States *v.* Rogers, 164 Fed. 520, 521 (1908); Howard *v.* State, 58 Ark. 229, 24 S. W. 8 (1893); Beard *v.* State, 81 Ark. 515, 99 S. W. 837 (1907); Klink *v.* People, 16 Colo. 467, 27 Pac. 1062 (1891); Saleen *v.* People, 41 Colo. 317, 92 Pac. 731 (1907); Dobbs *v.* State, 62 Kan. 108, 61 Pac. 408 (1900); Asbell *v.* State, 62 Kan. 209, 61 Pac. 690 (1900); Hamlin *v.* State, 67 Kan. 724, 74 Pac. 242 (1903); Holt *v.* State, 78 Miss. 631, 29 So. 527 (1900); Fugate *v.* State, 85 Miss. 94, 37 So. 554 (1904); State *v.* Williams, 147 Mo. 14, 19, 47 S. W. 891 (1898); Appo *v.* People, 20 N. Y. 531 (1860); Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539 (1886); Kinch *v.* State, 156 S. W. 649 (Tex. Cr. App.) (1913); State *v.* Superior Court, 15 Wash. 339, 46 Pac. 399 (1896); State *v.* Armstrong, 41 Wash. 601, 84 Pac. 584 (1906). See, however, United States *v.* Williams, 57 Fed. 201 (1893); United States *v.* Radford, 131 Fed. 378 (1904); Gross *v.* Wood, 117 Md. 362, 83 Atl. 337 (1912); Wickel *v.* Mertz, 49 Pa. Sup. 472 (1911); State *v.* David, 14 S. C. 428 (1880).

[47] Saleen *v.* People, 41 Colo. 317, 92 Pac. 731 (1907).

justice to the accused. There are no *bonâ fide* purchasers to be considered. No property rights will be disturbed. And while in civil suits the original winner will reluctantly part with his gains, and may feel harshly treated in being disturbed after the lapse of time, however unjust the original decision may have been, the government loses nothing which it should care to keep in reversing an unjust conviction of crime, when the injustice first appears, whether that is early or late. It is not only the case of an innocent man who has been convicted which makes desirable a statute enlarging the powers of a criminal court, but the case of a defendant whose innocence is not clear and whose trial has been unfair. Newly discovered evidence after the end of the term may show a degree of bias or disqualification on the part of jurymen for instance which should require a new trial. In such a case it is unjust to treat the conviction as final, and it is unsatisfactory to pardon one whose innocence is not clear. The matter has been accurately stated by the Supreme Court of Indiana.

"The power to pardon does not exclude the right to hear and determine; both powers may concurrently exist. Nor is a pardon always adequate relief. An innocent man suffering from an illegal sentence, procured by fraud or extorted by violence, may desire a trial and an acquittal which shall remove from his character the stain of guilt, and this the exercise of the pardoning power cannot do. To pardon is to exercise executive clemency; it is an act of mercy. An acquittal is the vindication of a right, the award of justice. Again, the executive may not feel warranted in turning a condemned criminal loose, and as he can grant no new trial, this he must do or deny a pardon. The Court need not discharge, but may put the accused again to trial. We cannot believe that the power to pardon was meant to cover every case of an unjust conviction, where the accused had, without fault on his part, not availed himself of the right of appeal." [48]

The fact that a pardon may not infrequently be the only redress which is open to an innocent man operates not only as an injustice to the innocent, but, as has been said, probably exerts a retroactive influence towards the continuance of the notion that a pardon makes a convict into a man of good character. Thus, as a reason for his decision that in spite of an Act of Parliament providing that convicts should forever be disqualified from selling spirits at

[48] Sanders *v.* State, 85 Ind. 318, 322 (1882).

retail, a pardoned convict might be licensed to do so, Hawkins, J., said:

"To treat it [the pardon] otherwise would be contrary to what certainly must have been the intention of the legislature; for I cannot believe that it was the intention of the legislature that if a man had the great misfortune to be wrongly convicted, and was pardoned on the ground that the conviction was wrong, the Queen's pardon, although absolving him from the pains of imprisonment, should nevertheless leave him to suffer the penal effect of his conviction by being prevented, in future, from following his avocation, notwithstanding the rectification of the error which had occurred. It has been argued that the Queen's pardon may be granted for other reasons than innocence, — that a notorious thief may have received the Queen's pardon in consideration of his having informed and given evidence against his accomplices. I do not know how that may be. Perhaps if he had been convicted, and suffered part of his sentence, and shewn contrition, some remission of his sentence rather than a Queen's pardon would be granted." [49]

A residence in South Carolina in recent years would perhaps convince one who shared the views of Hawkins, J., that sometimes in this country at least pardons are granted for other reasons than innocence.

It may be added that Hawkins' suggestion is at variance with the views expressed in the early books. A pardon "affirms the verdict and disaffirms it not." [50] A distinction in this respect was taken between an act of general pardon and a pardon of a particular offence. In the former case there was no presumption of guilt, but "the procuring of a special pardon doth presuppose, and it is a strong presumption that the party is guilty of the offence." [51] In a recent decision the Supreme Court of the United States expressed the same view of the matter.[52]

The doctrine that a pardon improves a man's character is the

[49] Hay *v.* Justices, 24 Q. B. D. 561, 567 (1890).

[50] Searle *v.* Williams, Hob. 288, 293 (1618).

[51] Sir Henry Fines' Case, Godbolt 414 (1623).

[52] In Burdick *v.* United States, 236 U. S. 79, 90 (1915), the court, upholding the right of one accused of crime to refuse to accept a pardon, said (without italics): "Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape *by confession of guilt implied in the acceptance of a pardon* may be rejected, — [the accused] preferring to be the victim of the law rather than its acknowledged transgressor — preferring death even to such certain infamy."

more objectionable because of the possible argument that a criminal who has served the sentence imposed upon him has expiated his crime, and is therefore in as good a position as if he had been pardoned. Indeed in England a statute expressly so provides.[53]

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[53] See Leyman *v.* Latimer, 3 Ex. D. 15, 17 n. (1877). 9 GEO. IV, c. 32, § 3 recites: "Whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged," and enacts that one who has been "convicted of any felony not punishable with death, and hath endured . . . the punishment . . . adjudged . . . the punishment so endured . . . shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted."